

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY 29 2009

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2007-0086
	)	DEPARTMENT A
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
DARRON KEITH CAMPBELL,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053420

Honorable Charles S. Sabalos, Judge  
Honorable Gus Aragón, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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R. Lamar Couser

Tucson  
Attorney for Appellant

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H O W A R D, Presiding Judge.

¶1 Following a jury trial, appellant Darron Campbell was convicted of possession of a narcotic drug for sale, a class two felony, and unlawful possession of drug paraphernalia,

a class six felony, both committed while he was on parole. The trial court found Campbell had five historical prior felony convictions and sentenced him to concurrent, presumptive terms of imprisonment, the longer of which was 15.75 years. Counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asserting that he had diligently reviewed the record but found no arguable issue for appeal, and asks us to search the record for fundamental error. Campbell has filed a supplemental brief raising numerous issues, one of which we remand for reconsideration by the trial court. We also address the other issues Campbell has raised and find that none of them merits reversal.

#### **\_\_\_\_\_ Motion to Suppress**

¶2 Campbell filed numerous motions to suppress cocaine and money found on his person and the cocaine found in his vehicle, claiming the following: the police had exceeded the scope of a welfare check when they searched the car and his person; there was no reasonable suspicion to justify detaining him once the emergency had ended, and particularly once Lakeisha Gregorio admitted the drugs belonged to her; and the items seized were “fruit[s] of the poisonous tree.” Campbell suggests he was denied the opportunity to call witnesses and present evidence, in part, because Judge Aragón presided over his case after Judge Sabalos recused himself at Campbell’s urging. To the extent Campbell suggests that Judge Aragón should have ignored the extensive suppression proceedings that had taken place before he was assigned to the case, we reject any such suggestion.

¶3 We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion, considering the evidence in the light most favorable to upholding the court's decision. *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991). We only consider the evidence presented at the suppression hearing. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). We have reviewed Campbell's numerous written motions to suppress and the transcripts from the extensive, four-day suppression hearing in connection with this appeal.

¶4 Tucson police officer Jonathan Wolgemuth testified at the suppression hearing that, in response to a 2:00 a.m. report that the occupants of the subject vehicle might be dead, he arrived at the scene, found the occupants of the vehicle alive, and proceeded to investigate driver Lakeisha Gregorio's self-reported warrant status. Soon after, Wolgemuth confirmed that there was at least one outstanding warrant for Gregorio's arrest, the nature of which he did not provide at the suppression hearing. Wolgemuth also confirmed the identities of Campbell and the other occupant of the vehicle. Wolgemuth arrested Gregorio a few minutes later and placed her in his patrol car. Campbell and the other passenger were then ordered out of the vehicle, and Officer Laura Thomas searched the vehicle incident to Gregorio's arrest. Campbell and the other occupant stood about twelve to fifteen feet away from the front passenger door while Thomas searched the car, which occurred approximately twenty minutes after Wolgemuth had arrived on the scene. The compact disc case with crack cocaine inside was seized during the search.

¶5 Wolgemuth arrested Campbell and placed him in Officer Ignacio Nunez's vehicle, where he remained until Nunez transferred him to another police car. During the transfer, Wolgemuth noticed a plastic bag in Campbell's shirt pocket that contained crack cocaine. A contemporaneous search of Campbell's person yielded \$1,148.10 in cash.

¶6 The trial court continued the suppression hearing to permit Campbell to present evidence that the officers had intentionally extended the scope of the welfare check in order to compel Campbell to remain at the scene while they searched the vehicle, a theory the court ultimately rejected. Wolgemuth testified that he had never met Campbell before the night in question and that he had learned about prior police contacts involving Campbell's vehicle only after Campbell was arrested. Thomas similarly testified that she had had no previous contact with Campbell or his vehicle before the night in question. In addition, bicycle patrol officer Edward Gray, who was not present on the night in question, testified that Wolgemuth, Thomas, and Nunez had not been involved in his prior contacts with Campbell.

¶7 In its order denying the motion to suppress, the trial court concluded, "the police conduct leading to defendant's arrest was appropriate and legal under the circumstances." The court reasoned that "the police had reasonable cause to conduct a welfare check of the above vehicle pursuant to the call that the police received regarding possible dead people in the vehicle . . . [and] during the welfare check, the police had information leading to probable cause to arrest Lakeisha Gregorio . . . [and u]pon search of

said vehicle incident to Ms. Gregorio’s arrest, the crack cocaine was found on [Campbell’s] person and in his vicinity.”

¶8 On appeal, Campbell purportedly challenges the “unlawful stop, seizure, detention or arrest,” arguing that his rights were violated in three distinct stages: the initial stage ended when Wolgemuth woke Gregorio; the second stage ended when Wolgemuth “turn[ed] toward[] his patrol car in an endeavor to run a warrants check on . . . Gregorio”; and to the extent we understand the third stage, it began when Gregorio told Wolgemuth she might have outstanding arrest warrants and continued during Gregorio’s arrest and the ensuing vehicle search. Despite having argued that he is, in fact, challenging the “stop,” Campbell nonetheless states he “is not contending that there was no reasonable suspicion to detain . . . Gregorio while [Wolgemuth] checked for confirmation of [her] warrants” and seemingly qualifies his earlier statement by claiming that he is actually arguing that Wolgemuth had exceeded the scope of any such detention. He further contends that his detention “became unlawful, if it were not already, at the point of . . . Gregorio’s initial arrest which was not supported by probable cause.”

¶9 To the extent we understand Campbell’s argument, it does not appear he is challenging the initial police contact, which he characterizes as a “stop,” despite the fact that it arose from a 911 emergency call involving a parked vehicle. Rather, the focus of his challenge appears to be on the duration of his detention, the search of the vehicle, and his ultimate arrest. But Campbell may not rely on the legality or illegality of Gregorio’s

detention, arrest, and the ensuing search pursuant to her arrest to challenge the reasonableness of the duration of his own detention and his subsequent arrest based on an asserted violation of his Fourth Amendment rights. *See Alderman v. United States*, 394 U.S. 165, 174 (1969) (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”); *cf. State v. Gomez*, 198 Ariz. 61, ¶ 6, 6 P.3d 765, 766 (App. 2000) (defendant had standing to challenge investigatory stop of vehicle in which he was a passenger, where challenge did not extend to evidence found in common areas of vehicle, but only to items found on his person); *see generally Arizona v. Johnson*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S. Ct. 781, 787 (2009) (passenger is seized during a traffic stop and thus has standing to challenge constitutionality of stop). Although the trial court considered and rejected the related claim that the police had intentionally detained Campbell based on his prior dealings with law enforcement, it is not clear from the record whether the court independently considered the reasonableness of the duration of Campbell’s detention and its potential effect on his subsequent arrest. Moreover, the record is not clear whether the court considered Campbell’s purported ownership interest in the vehicle or whether he had asserted that interest at the time of the search.

¶10 Relying on the United States Supreme Court’s recent decision in *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710 (2009), Campbell filed a motion for leave to supplement his argument on appeal, contending that, because the police had neither a warrant or consent

to search “his” vehicle, the searches of the vehicle and his person were illegal.<sup>1</sup> In *Gant*, the Court held that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” \_\_\_ U.S. at \_\_\_, 129 S. Ct. at 1723. After Gant was arrested for driving with a suspended license, handcuffed, and placed in the back of a locked patrol car, police officers searched his vehicle and found cocaine in the pocket of a jacket located in the vehicle. *Id.* at 1714. Gant appealed the trial court’s denial of his motion to suppress the cocaine on the ground that the warrantless search was unreasonable under the Fourth Amendment of the United States Constitution, a position the Supreme Court found persuasive. *Id.*

¶11 Like Gant, Gregorio had already been arrested and placed in a police car when the vehicle was searched, and therefore, she was not within reaching distance of the passenger compartment of the vehicle. *Id.* However, the record shows that the outstanding warrants for Gregorio’s arrest were for criminal damage, possession of drug paraphernalia, and theft. It appears no evidence was presented at the suppression hearing confirming whether Gregorio was arrested on one, two, or all three of the outstanding warrants on the night in question. Unlike Gant, who was arrested for a traffic offense for which no evidence could have been found in his vehicle, *id.* at 1714, it may have been reasonable to believe the

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<sup>1</sup>Although Campbell does not refer to *Gant* by name, it is clear he is referring to that case.

vehicle contained evidence relevant to the offenses for which Gregorio was arrested. *See Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring) (search incident to arrest permissible when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle”). In fact, Thomas testified at the suppression hearing that the police had asked Campbell and the other occupant to “step out and away from the car” while she searched it “[s]o that they couldn’t destroy any potential evidence that may [have been] in the car.” However, in the absence of testimony or other evidence regarding the reason Gregorio was arrested, we are unable to conclude whether the search was proper under *Gant*.

¶12 Because the trial court based its decision on the search incident to Gregorio’s arrest, we remand this matter to the trial court to reconsider its denial of Campbell’s motion to suppress, directing the court to clarify whether and to what extent the court considered the reasonableness of the duration of Campbell’s detention independent of his claim that the police had intentionally compelled him to remain on the scene because of his previous dealings with law enforcement; to consider the effect, if any, of the Supreme Court’s decision in *Gant* on the court’s ruling; and to consider the relevance, if any, of Campbell’s ownership interest in the vehicle on the court’s ruling. If the trial court is unable to consider these issues based on the existing record, the court may, in its discretion, conduct a limited evidentiary hearing to ascertain any additional information the court deems necessary.



## Motions to Dismiss

¶13 Campbell argues that, because it was unclear whether the state had relied on the drugs found in the vehicle, his shirt pocket, or both, when it alleged possession of a narcotic drug for sale, the indictment<sup>2</sup> was duplicitous and should be dismissed. We review the denial of a motion to dismiss for an abuse of discretion. *See State v. Stuart*, 168 Ariz. 83, 85, 811 P.2d 335, 337 (App. 1990). In denying Campbell’s motion, the trial court found the cocaine seized from the vehicle and from Campbell’s person was “presumptively part of a larger scheme for possession of cocaine base for sale.” *See State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985) (numerous transactions that were part of larger theft scheme properly charged as single count in indictment). The court had before it the following evidence to support its conclusion that all of the cocaine was part of a larger scheme for sale: both quantities of cocaine were found near or on Campbell, Campbell did not have a pipe or lighter on his person, he was carrying a large quantity of cash, and his cellular telephone rang three times in just a few minutes. Based on this evidence, we cannot say the court abused its discretion by denying Campbell’s motion to dismiss.

¶14 Campbell also challenges the trial court’s denial of another motion to dismiss, arguing “the trial court abused its discretion when it failed to grant [his] motion to dismiss

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<sup>2</sup>This matter was remanded to the grand jury for a redetermination of probable cause to correct inaccurate testimony regarding the quantities of cocaine and to present evidence that Gregorio had told the police the cocaine belonged to her. We refer to the remanded indictment in this decision.

the criminal proceeding inasmuch as the prosecution destroyed the specifically requested chain of custody reports.” Asserting, generally, flaws in the chain of custody, Campbell suggests the evidence was somehow altered or tampered with. Campbell has not provided us with even one citation to a specific motion or ruling he attempts to challenge in this argument. He refers to the transcripts of the suppression hearings that spanned four days, also without specific citation to pages or dates within those transcripts. Moreover, Campbell characterized his argument as a challenge to the court’s denial of his motion to dismiss, but in the final paragraph of this argument he asserts the court erred by denying his motion in limine.<sup>3</sup> Notwithstanding Campbell’s failure to cite the record to support his argument, we find no evidence in the record to support a claim that the chain of custody was deficient. Moreover, in the absence of proper citation to the record, we need not consider this argument. *See State v. Bocharski*, 218 Ariz. 476, n.9, 189 P.3d 403, 413 n.9 (2008) (appellate court need not consider argument not in compliance with Rule 31.13(c)(vi), Ariz. R. Crim. P., which requires argument on appeal contain “the reasons therefor, with citations to the authorities, statutes and parts of the record relied on”).

¶15 In a separate argument, Campbell contends the charges against him should have been dismissed because corrections officers removed privileged legal documents during

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<sup>3</sup>We presume Campbell may be challenging the following ruling, in which the trial court denied his motion to exclude drug exhibits: “Defendant has also requested that the above cocaine be excluded, arguing that there are inconsistencies regarding where said cocaine was found and who maintained custody of it thereafter. These are items for the defendant to argue to the jury and are not sufficient bases for exclusion of these items.”

an August 2006 search of his cell, essentially denying him the right to counsel. This claim was addressed at three different evidentiary hearings. One of Campbell's many attorneys, Brick Storts, testified and provided written notice to the court that he would not participate in the motion to dismiss because he had thoroughly investigated the matter and was convinced no legal documents had been removed from Campbell's cell. Ian Tomlinson, an attorney who worked with Storts, similarly testified. Deputy County Attorney Sean Holguin, legal advisor to the Pima County Sheriff's Department, testified that any legal materials discovered during the search of an inmate's cell may be examined only for contraband, but may not be read. In addition, the prosecutor avowed to the court that she had never received any verbal or written information about any documents that had been removed from Campbell's cell. Notably, Campbell did not mention the removal of any legal documents specifically related to this case in the two inmate grievances he filed just after his cell was searched.

¶16 The record supports the trial court's findings that the prosecutor was not "in any way involved in the jailhouse search," nor did she "review defendant's legal papers or benefit from any taking of defendant's legal papers . . . [and] that the search and/or confiscation of defendant's legal papers will not prevent a fair trial for defendant." We also reject Campbell's claim that *State v. Warner*, 150 Ariz. 123, 722 P.2d 291 (1986), somehow requires a different outcome. Unlike that case, in which personal papers including attorney work product and summaries of jailhouse conferences with defense counsel were seized from

Warner's cell and given to the prosecutor, Campbell has utterly failed to show that any documents related to this case, much less confidential documents, were removed from his cell. *Id.* at 125, 127-28, 722 P.2d at 293, 295-96.

### **Selective Enforcement**

¶17 Campbell contends he was entitled to an evidentiary hearing on and to retain expert witnesses to support his claim that police had targeted him in the past and on the night in question because he is African-American. The trial court appointed an investigator to help Campbell pursue this claim. Although the court denied Campbell's request to call ninety-one police officers to testify in connection with his selective enforcement defense at trial, the court permitted Campbell to present his claim during a two-day pretrial hearing.

¶18 Wolgemuth testified that he did not recall any prior contact with any occupants in Campbell's vehicle and denied that the occupants' race had influenced his handling of the case. He explained that, although police records may show that he had previously checked the license plates of Campbell's vehicle, he typically ran forty to fifty license plate checks during each shift he worked. Notably, Campbell testified that he did not recall whether Wolgemuth had ever stopped him in the past. Campbell also questioned the superintendent of police records, who testified she was unable to find any police "flags" that had been placed on Campbell, his vehicle, or Gregorio in the year prior to the incident, although she did show police contact regarding other incidents prior to that time.

¶19 Campbell acknowledged to the trial court that he had previously loaned his vehicle to individuals who he knew were affiliated with drugs, and the court responded, “Did it ever dawn on you that if you loaned [your vehicle] out to people that were using or carrying drugs that it might lead to that vehicle being stopped while they were in it?” The court then told Campbell, “your evidence so far is not impressing me as far as proving racial profiling or selective prosecution. What I’m hearing so far is that there’s a lot of evidence that the police had corroborating their having a belief that they had reason to stop your vehicle [in the past].”

¶20 Following the evidentiary hearings, the court found Campbell had “failed to present credible evidence of both discriminatory effect and intent that he was the victim of selective enforcement,” denying his request for appointment of an expert and precluding him from presenting a selective enforcement defense at trial. *See Jones v. Sterling*, 210 Ariz. 308, ¶¶ 29-30, 110 P.3d 1271, 1278 (2005), *quoting United States v. Armstrong*, 517 U.S. 456, 465 (1996) (to justify expenditure of public money to fund investigation of selective enforcement claim, defendant must show state action “‘had a discriminatory effect and that it was motivated by a discriminatory purpose’”). The court also found that, because Campbell’s arrest “was the result of a 911 call by a private citizen . . .[,] the police contact with the defendant on the night of his arrest had nothing to do with any selective prosecution or selective enforcement of traffic laws.” For all of these reasons, we conclude the court

properly denied Campbell's request to present a selective enforcement defense. *State v. Swoopes*, 216 Ariz. 390, ¶ 39, 166 P.3d 945, 957 (App. 2007).

¶21 Pursuant to our obligation under *Anders*, 387 U.S. at 744, we have searched the record for fundamental, reversible error. With the possible exception of the trial court's denial of Campbell's motion to suppress, we find no such error. We thus remand that issue for further proceedings consistent with this decision.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge